



## Kentucky Law Journal

Volume 60 | Issue 3


Article 9

1972

# Broad-Form Deed--Obstacle to Peaceful Co-Existence Between Mineral and Surface Owners

Michael V. Withrow  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Oil, Gas, and Mineral Law Commons](#), and the [Property Law and Real Estate Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Withrow, Michael V. (1972) "Broad-Form Deed--Obstacle to Peaceful Co-Existence Between Mineral and Surface Owners," *Kentucky Law Journal*: Vol. 60 : Iss. 3 , Article 9.  
Available at: <https://uknowledge.uky.edu/klj/vol60/iss3/9>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

## BROAD-FORM DEED—OBSTACLE TO PEACEFUL CO-EXISTENCE BETWEEN MINERAL AND SURFACE OWNERS

It wasn't ever God's intention  
for the land to be torn up like  
it is.<sup>1</sup>

Those are the words concerning the broad form deed and strip mining of widowed, 76 year old Katherine Haynes, who has lived all her life up Bull Creek, near the Eastern Kentucky hill town of Blackey. Strip mining for coal has caused more citizen controversy, debate and anxiety concerning the natural resources and environment of Kentucky than any other ecological issue. Furthermore, more of the same is expected as coal operators continue to sever the earth for what has been referred to as black gold.<sup>2</sup>

Strip mining, and more specifically contour stripping as used in Eastern Kentucky and which is the major concern of this comment, differs from underground mining. Underground mining removes the coal from beneath the earth's surface, while strip mining is essentially a method of removing coal or other minerals from the earth which utilizes a removal of the overlying strata as the primary method of obtaining access to the minerals.<sup>3</sup>

### BROAD FORM DEED

Any discussion of strip mining must instinctively include the so-called broad form mineral deed. The broad form deed was the instrument used in Eastern Kentucky at the turn of the century by coal companies to sever the mineral estate from the surface estate. As to the prevalence of the broad form deed, it has been stated:

Today, by conservative estimate, title to the minerals underlying some ninety percent of the land in the Kentucky counties of Bell, Harlan, Letcher, Perry, Knott, Pike and Floyd is severed from the general surface by deeds of this kind. A lesser percentage of the land is similarly affected in Knox, Whitley, McCreary, Leslie, Lawrence and Morgan Counties. These mineral estates were generally purchased from the landowners in the period 1785-1915 by use of the broad form deed.<sup>4</sup>

One particular version is the "Mayo" form of mineral lease which

---

<sup>1</sup> The Lexington Herald, Sept. 8, 1971, at 5, col. 1.

<sup>2</sup> Schneider, *Strip Mining in Kentucky*, 59 Ky. L.J. 652 (1971).

<sup>3</sup> Note, *Construction of Deeds Granting the Right to Strip Mine*, 40 U. CIN. L. REV. 304 (1971).

<sup>4</sup> Brief for Appellants at 2, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

was prevalent in Kentucky in the early 1900's. The "Mayo" form provides that the mineral owners have the right to "use and operate the same and surface thereof . . . in any manner that may be deemed necessary or convenient for mining," and it contains a release by the surface owner of any claim for damages in the use of the land and surface.<sup>5</sup>

Mineral deeds severing the mineral estate from the surface estate are not peculiar to Eastern Kentucky. Although concentration of this comment is placed upon the broad form deed as used in Eastern Kentucky, other states as well have been affected by these deeds. Such mineral deeds are common throughout the coal fields of Pennsylvania, West Virginia, Ohio, Tennessee and other states. It is significant, however, that of all the coal states ruling on mineral deeds classified as the broad form type, only Kentucky has reduced the property rights of the surface owner to a mere license to occupy the surface, until such time as the mineral owner elects to destroy the surface in order to remove the coal.<sup>6</sup> The highest courts in four states have favored the surface owner against the destruction of his estate. There is substantial recognition in other states that the mineral owner cannot destroy the surface owner's estate by strip mining without his consent and without paying him fair compensation.<sup>7</sup>

#### KENTUCKY'S INTERPRETATION OF THE BROAD FORM DEED

The Kentucky interpretation of the broad form mineral deed was announced by the Court of Appeals in 1956 in the landmark case of *Buchanan v. Watson*.<sup>8</sup> The trial judge held that under the mineral deed in question, the coal could be removed by the strip mine method, but damages had to be paid for the destruction of the surface owner's interest in the surface and the timber thereon. Both the mineral owner and surface owner appealed this decision. The Kentucky Court of Appeals held that the mineral owner could remove coal by the strip mining process, and that the mineral owner was not liable to the surface owner for destruction of the surface "in the absence of arbitrary, wanton or malicious destruction."

Since the *Buchanan* decision, the Court has reaffirmed its view on

---

<sup>5</sup> Schneider, *supra* note 2, at 653.

<sup>6</sup> *Id.* at 654.

<sup>7</sup> *United States v. Polino*, 131 F.Supp. 772 (N.D. W. Va. 1955); *Franklin v. Callicot*, 119 N.E.2d 688 (Ohio 1954); *East Ohio Gas Co. v. James Bros. Coal Co.*, 85 N.E.2d 816 (Ohio 1948); *Wilkes Barre Township v. Corgan*, 170 A.2d 97 (Pa. 1961); *Campbell v. Campbell*, 199 S.W.2d 931 (Tenn. 1946); *West Virginia-Pittsburg Coal Co. v. Strong*, 42 S.E.2d 46 (W. Va. 1947).

<sup>8</sup> 290 S.W.2d 40 (Ky. 1956).

several occasions,<sup>9</sup> although this view is the minority view among states which have ruled on the meaning of the broad form deed.<sup>10</sup> The latest challenge to the interpretation of the broad form deed in Kentucky arose in the case of *Martin v. Kentucky Oak Mining Company*.<sup>11</sup> The litigation centered around the construction of a 1905 deed granted to the coal company by Martin's predecessor in title. This deed granted the coal company the right to "use" the surface "as may be necessary or convenient to the exercise and enjoyment of the property rights and privileges hereby . . . conveyed."<sup>12</sup> The deed also contained a clause waiving the surface owner's right to sue for damages to the surface.<sup>13</sup> The plaintiff contended that this deed would not permit the owner of the mineral estate to strip mine, but that if it did, the defendants would have to pay for the privilege.<sup>14</sup> In a 4-3 decision, the Court of Appeals held that the owner of the coal rights was entitled to strip mine, and furthermore, would not be liable to the owner of the surface rights for damage to the surface unless the mining operation should be conducted in a "wanton, malicious or arbitrary manner" (*Buchanan* standard). The Court stated that the plain language of the conveyance of the mineral interests granted the right to remove the minerals without limitation on the manner. The Court further stated that the word "mining" was not limited to the sinking of a shaft but embraced other methods, including strip mining; and, that the owner of mineral rights had the paramount right to use the surface in the course of its business.

#### EXISTING CONDITIONS AT TIME OF SEVERANCE OF MINERAL ESTATE FROM SURFACE ESTATE

At the turn of the century, the state of technology was such that a surface estate and a mineral estate were compatible since underground mining appeared to be the major form of mining. Because the grantee was limited to the use of the land for "mining," it becomes important

---

<sup>9</sup> *A. J. Croley v. Round Mountain Coal Co.*, 374 S.W.2d 852 (Ky. 1964); *Blue Diamond Coal Co. v. Campbell*, 371 S.W.2d 483 (Ky. 1963); *Ritchie v. Midland Mining Co.*, 347 S.W.2d 548 (Ky. 1961); *Kodak Coal Co. v. Smith*, 338 S.W.2d 699 (Ky. 1960); *Blue Diamond Coal Co. v. Neace*, 337 S.W.2d 725 (Ky. 1960); *Bevander Coal Co. v. Mazney*, 320 S.W.2d 301 (Ky. 1959).

<sup>10</sup> See cases cited in note 7.

*Callicott*, 119 N.E.2d 688 (Ohio 1954); *East Ohio Gas Co. v. James Bros. Coal Co.*, 85 N.E.2d 816 (Ohio 1948); *Wilkes Barre Township v. Corgan*, 170 A.2d 97 (Pa. 1961); *Campbell v. Campbell*, 199 S.W.2d 931 (Tenn. 1946); *West Virginia-Pittsburg Coal Co. v. Strong*, 42 S.W.2d 46 (W. Va. 1947).

<sup>11</sup> 429 S.W.2d 395 (Ky. 1968).

<sup>12</sup> *Id.* at 397.

<sup>13</sup> *Id.* at 399.

<sup>14</sup> *Id.* at 396, noted in 40 U. CIN. L. REV. 304, 305 (1971).

to ascertain the meaning of the word. In so doing, utmost consideration should be given the ordinary meaning of this word as it was used in the early 1900's by the grantor and the grantee because this was the period during which severance of the mineral and surface estate occurred due to the use of the broad form deed.

The owners of the surface estate allege that underground mining was the type of mining conducted during this period and, therefore, the only method of mining authorized under the broad form deed. Several authorities contemporaneous with the period of the broad form deed that tend to support the surface owner's contentions in broad form deed controversies stated:

A 'mine' in its specific sense is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels, . . . as opposed to a quarry where the whole excavation is open. . . . As originally used, the word 'mine' was exclusively connected with underground workings . . .<sup>15</sup>

The primary meaning of the word 'mine,' standing alone, is an underground excavation in the earth from which metallic ores or other mineral substances are taken by digging.<sup>16</sup>

. . . [T]he word 'mine' is said to be an excavation, properly underground, for digging out some useful product, as ore, metal or coal.<sup>17</sup>

The mineral estate owners, on the other hand, argue that strip mining was indeed prevalent during the period of the broad form deed. Further, they allege that since the broad form deed stated no specific type of mining (e.g. underground and/or strip mining) they are entitled to obtain the coal in any manner they deem economically feasible, whether it be by underground mining or strip mining.

An authority which supports the mineral owners' contentions stated as follows:

Reference to coal in America was made as early as 1672, but strip mining, of a crude sort, did not come into being until around 1800. These early strip miners worked along the crop line with picks and shovels and wheelbarrows. . . .

---

<sup>15</sup> 18 R.C.L., *Mining & Minerals*, § 2 (1917); noted in brief for Kentucky Civil Liberties Union as *Amicus Curiae* at 12, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968). (The Kentucky Civil Liberties Union is an organization dedicated to preserving the rights of individuals and to the conservation of Kentucky).

<sup>16</sup> C.Y.C. OF MINING & MINERALS, § 532 (1907); noted in brief for Kentucky Civil Liberties Union as *Amicus Curiae* at 12, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>17</sup> *Barton v. Wichita River Oil Co.*, 187 S.W. 1043 (Tex. 1916); noted in brief for Kentucky Civil Liberties Union as *Amicus Curiae* at 12, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

Some of the first strip mining in Kentucky was done in 1820 . . . near Paradise, on Green River in Muhlenberg County.

The 'mechanical' method of strip mining employing horse-drawn equipment probably had its beginning in Kentucky in 1870, when Christopher Pitman opened a strip mine at London, in Laurel County.

The year 1905 saw the opening of Kentucky's first mechanical strip mine at Lily in Laurel County. The Lily-Jellico Coal Company contracted with the Robinson Creek Construction Company for the stripping work, and the coal was hauled by horse-drawn wagons to a tippie, where it was loaded into railroad cars.<sup>18</sup>

#### INTENT OF THE PARTIES

What was the intent of the parties during the period 1785-1915? (the period in which the mineral estate was severed from the surface estate in Eastern Kentucky). By every rule of contract construction, including construction of deeds, the intention of the parties is the ultimate question for the interpreter.<sup>19</sup>

As can be seen from the preceeding section relating to the existence of strip mining during the early 1900's, it is *not* certain whether strip mining was or was not employed in Eastern Kentucky at the time of the severance of the mineral and surface estates. Perhaps the question should be that expressed by Judge Hill of the Kentucky Court of Appeals in his dissenting opinion in *Martin v. Kentucky Oak Mining Company*:

What was the intention of the parties in 1905? This question provokes another question, What were the usual, known, and accepted mining methods at that time?<sup>20</sup>

While it is true that the broad form deeds conveyed all the coal, it is contended by the surface owners that the method of recovery was limited to the method practiced in the region at the time of the broad form deed grant. The *Buchanan* decision and the mineral estate owner's argumentation, however, seems to have been based on the proposition that the parties clearly intended to convey the coal for the purpose of enabling the grantee to remove the coal from under the surface of the land. And, therefore, to deny the grantee the right

---

<sup>18</sup> THE KENTUCKY DEPARTMENT OF NATURAL RESOURCES, STRIP MINING IN KENTUCKY, 6 (1965); noted in brief for Appellees at 22, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>19</sup> 17A C.J.S. *Contracts* § 295 (1963).

<sup>20</sup> *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 401 (Ky. 1968) (dissenting opinion).

to remove the coal by the only feasible process would defeat the principal purpose of the conveyance.<sup>21</sup>

It is inconceivable that the surface owners would have authorized the destruction of their land and the eventual disinheritance of their children for a mere fifty cents to a few dollars per acre. As undoubtedly contemplated by the parties, the mineral owner would not be harassed by suits for damages resulting from waste dumps and drying up of wells, the reasonably foreseeable results of underground mining.<sup>22</sup> As stated by Harry M. Caudill, a well known critic of strip mine practices:

. . . [T]here was no meeting of the minds between the purchaser and the sellers to the effect that the surface could be turned upside-down and destroyed, and that the proposition was never considered, never broached, never discussed and never agreed upon.<sup>23</sup> And it is fundamental that an agreement enforceable at law consist of two persons being of the same mind concerning the matter agreed upon.<sup>24</sup>

#### CONSTRUCTION OF THE DEED AGAINST THE GRANTOR

It has been traditionally held that a written contract is construed most strictly against the one drafting it. Because a deed is generally prepared by the grantor, a corollary of this principal is that where there is ambiguity or uncertainty in a deed, it will be construed most strongly against the grantor and in favor of the grantee.<sup>25</sup> The basic rationale given for construing an ambiguous instrument against the grantor is that the deed is expressed in words of the grantor's election, and thus, he is chargeable with the language used.<sup>26</sup>

The mineral estate owners (strip miners) reinforce these general principles by stating that a technical rule of construction may be invoked only in construing an ambiguous or uncertain deed or contract,<sup>27</sup> and that technical rules of construction are not to be resorted

<sup>21</sup> Brief for Kentucky Civil Liberties Union as Amicus Curiae at 8, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>22</sup> Brief for Appellants at 12-13, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *Tucker v. Pete Sheeran Bro. & Co.*, 160 S.W. 176 (Ky. 1913); cited in brief for Appellants at 12, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>25</sup> *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956); *McIntire v. Marian Coal Co.*, 227 S.W. 298 (Ky. 1921). In *Kentucky Diamond Mining and Developing Co. v. Kentucky Transvaal Diamond Co.*, 132 S.W. 397, 399 (Ky. 1910), the corollary as well as its rationale was given as follows:

A deed is to be construed against the grantor rather than against the grantee because the grantor selects his own words. . . .

<sup>26</sup> 23 AM. JUR. 2d *Deeds* § 165 (1965).

<sup>27</sup> Brief for Kentucky Members of the National Council of Coal Lessors, Inc. as Amicus Curiae at 15-16, *Martin v. Kentucky Oak Mining Co.*, 429 S.W. 2d 395 (Ky. 1968).

to when the meaning of the parties is plain and obvious.<sup>28</sup> Thus, when there is no ambiguity in a deed the intent of a plain instrument must be found within its four corners.<sup>29</sup>

The broad form deed has been expressly held to be unambiguous for almost a half century beginning in *McIntire v. Marian Coal Company*.<sup>30</sup>

There is no claim that the terms of the deed are ambiguous or uncertain, and no such claim could well be made, for it leaves nothing to be supplied, but makes a sweeping and complete conveyance of all the coal and other minerals and certain specified rights and privileges to the company, to be by it exercised at will . . . whenever and where 'deemed necessary or convenient' by the grantee or its successors in title, . . . and that McIntire and his grantees should have the free use of the surface only when and to the extent that the company did not deem the surface either 'necessary or convenient' to its business.

The mineral estate owners therefore reason that *Buchanan* and *Martin* applied only the rule from *McIntire* that a deed which grants land and certain specified rights, there being no ambiguity in the instrument, will be construed in compliance with its terms.

The surface estate owners, on the other hand, contend that from *McIntire* to the present date, the corollary has been recited without reason for it. The result has been a blind application of the rule without regard to who prepared the instrument.

The Court in *Martin* emphasized that it was construing the deed against the grantor's predecessors in title.<sup>31</sup> Employing a textbook rule of construction, that an ambiguous deed is to be construed against its maker, this decision contrasts sharply with the Court's traditional failure to utilize the proper rule of construction with respect to the intentions of the parties to the deed. The Court failed to focus on the fact that the deed in *Martin* had been prepared by the defendant grantee's attorney.<sup>32</sup> Judicial notice should be taken that the broad form deed *was not* prepared by the grantors. It is common knowledge

---

<sup>28</sup> *Combs v. Hounshell*, 347 S.W.2d 550 (Ky. 1961); *Hall v. Meade*, 51 S.W.2d 974 (Ky. 1932).

<sup>29</sup> *Gabbard v. Short*, 351 S.W.2d 510 (Ky. 1961); *Lambert v. Pritchett*, 284 S.W.2d 90 (Ky. 1955); *Hudson v. Collins*, 233 S.W. 1101 (Ky. 1920); *Allen v. Henson*, 217 S.W. 120 (Ky. 1919). In *Sword v. Sword*, 252 S.W.2d 869, 870 (Ky. 1952) the Court stated:

Where the language employed in a deed is uncertain in its meaning, it is proper to consider the nature of the instrument, the situation of the parties executing it, and the objects which they have in view.

<sup>30</sup> 227 S.W. 298, 299 (Ky. 1921).

<sup>31</sup> 429 S.W.2d 395, 398 (Ky. 1968).

<sup>32</sup> Note, *Construction of Deeds Granting the Right to Strip Mine*, 40 U. CIN. L. REV. 304, 305 (1971).



that the coal companies and their highly skilled draftsmen prepared the printed broad form deeds. More than 25 per cent of such mineral deeds were signed by grantors who could so much as scrawl their names.<sup>33</sup> Therefore, since the coal companies selected the words to be used in the deeds, the deeds should properly be construed against the coal company, the draftsman of the broad form deed, as it alone caused the uncertainty to exist.<sup>34</sup>

#### SPECIFIC GRANT TO STRIP MINE

It is argued by the mineral owners that the broad form mineral deed should be construed to permit strip mining because such mining was in existence in Eastern Kentucky at the time the broad form deeds were executed.<sup>35</sup> Accepting this statement as true, it would tend to emphasize the responsibility of the draftsman of the broad form deed to specifically include the right to mine in such manner. Thus, if strip mining were known in a locality, it would have been a simple procedure to insert this type of mining into the deed.

The West Virginia and Pennsylvania courts focused directly on whether the parties intended to authorize the practice of strip mining. After consideration the courts concluded that parties to a deed made prior to general acceptance of strip mining would not be deemed to have transferred such a right, because if they had so intended, they would have mentioned the practice.<sup>36</sup> As an example, the Supreme Court of Pennsylvania employed this rationale in *Heidt v. Aughenbaugh Coal Co.*, where the parties used the following language:

The right to mine to include all practical methods now in use, or which may hereafter be used, and the use of improved machinery and fixtures or appliances for said purposes and the right to strip the surface for, excavate, dig, bore, shaft, quarry, and otherwise . . .<sup>37</sup> [emphasis added].

Faced with this language the court found an express grant to strip mine because the right to mine in such manner was plainly set out in unambiguous terms.

The surface estate owners contend that strip mining was not in common use at the time of severance of the mineral estate from the surface estate, but if it were, it was not provided for by express

---

<sup>33</sup> H. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS*, 70, 74 (1963).

<sup>34</sup> Brief for Sierra Club as Amicus Curiae at 10-11, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>35</sup> Brief for Big Sandy-Elkhorn Coal Operators Association as Amicus Curiae at 8, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>36</sup> See *supra* note 32, at 311.

<sup>37</sup> 176 A.2d 400, 402 (Pa. 1962). *Noted in* 40 U. CIN. L. REV., *supra* note 32.

language and therefore underground mining is the only form of mining authorized by the broad form mineral deed. In *New Charter Coal Co. v. McKee*,<sup>38</sup> the Supreme Court of Pennsylvania discussed the textbook practice of construing standard form deeds prepared by the grantee against the grantor and stated that normally a deed should be construed against the grantor "unless, of course, the grantee drafted the grant and was therefore responsible for the ambiguity."<sup>39</sup> Where one party to a contract is privileged to set forth the terms to which another party is to assent, and a controversy arises as to the meaning, the contract should be construed strictly against the writer and liberally toward the other party.<sup>40</sup> A provision of a contract which does not clearly express the intention of the parties should be construed against the one for whose benefit it was inserted.

Thus, it becomes important to determine which party wrote the deed, the mining customs when the deed was written, and whether the coal had already been strip mined. *Buchanan* and *Martin* attempt to imply the right to strip mine from the conveyance of the coal. If this implication is correct, it appears that the coal companies should be chargeable with the language actually used in the deeds. To do otherwise would be contrary to principles of fairness and justice as well as contrary to an established rule of law of construing the contract against the one who caused the ambiguity.

#### DISCREPANCY IN CONSTRUING OIL DEED AS OPPOSED TO COAL DEEDS

Contrary to the established position it has taken with respect to the surface mining of coal, the Kentucky Court of Appeals has followed an entirely opposite view of construction concerning oil rights. In *Wiser Oil Company v. Conley*,<sup>41</sup> the Court held that parties to a 1917 lease intended that the oil should be produced by drilling in a customary manner prevailing when the lease was executed, and the holders of the lease would be liable to the surface owner for damage to the surface of the land and coal thereunder resulting from the use of a "water-flooding" method to increase the oil production. "Water-flooding" was a new method of extracting oil that was highly destructive to the surface. The Court held that the right "to use all means and appliances on or off these premises to secure and facilitate the produc-

---

<sup>38</sup> 191 A.2d 830 (Pa. 1963).

<sup>39</sup> *Id.* at 833. *Noted in* 40 U. CIN. L. REV., *supra* note 32, at 311.

<sup>40</sup> *Green v. Royal Neighbors*, 73 P.2d 1 (Kan. 1937); *Annot.*, 114 A.L.R. 244.

<sup>41</sup> 346 S.W.2d 718 (Ky. 1961).

tion of oil and gas" and the fact that *all* of the oil was conveyed did not give the mineral holder the right to destroy the surface.<sup>42</sup>

Concerning this decision, the Court in *Martin* said:

It is suggested that the court in *Wiser Oil Company v. Conley* did depart from the principles of *Buchanan v. Watson*, in respect to oil rights. . . . Perhaps *Wiser* is distinguishable from *Buchanan* on some basis other than that stated in the opinion in *Wiser*, or perhaps it is a departure from *Buchanan*. In any event we do not feel compelled in this opinion to explain, justify, reconcile or distinguish *Wiser*. The Court has decided to adhere to *Buchanan* whether or not it conflicts with *Wiser*.<sup>43</sup>

Judge Hill's dissenting opinion in *Martin* was more emphatic: "*Wiser* and *Buchanan* are as inconsistent as sin and salvation."<sup>44</sup>

#### STARE DECISIS

The rule *stare decisis* finds support in the principle that courts ought not to withdraw or overrule decisions which have been promulgated and published by them, and on the faith and credit of which individuals and the public have entered into contracts or acquired property rights.<sup>45</sup> The rights of the owners of subterranean mineral interests have been established by a long history of case law. Therefore, parties acting on these enumerated rights have bought and sold mineral interests on the strength of such precedent.<sup>46</sup> The application of *stare decisis* induced the Court of Appeals to the result that it reached in the *Martin* case.

It is suggested by the mineral owners that even if the *Buchanan* decision were not abundantly justified by well established principles of law, since the ruling has been effective for sixteen years and reaffirmed repeatedly by the Court, it would be the height of injustice at this time to reverse that decision and hence destroy the rights of persons who have made substantial investments in reliance upon it. Coal operators have made large investments through the acquisition of mineral rights and the purchase of tremendously expensive equipment in reliance upon *Buchanan*. To reverse *Buchanan* now would be to take away these very substantial investments without recognizing the operator's constitutional rights to due process of law. If precedents

---

<sup>42</sup> *Id.* at 720.

<sup>43</sup> *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 399 (Ky. 1968).

<sup>44</sup> *Id.* at 402.

<sup>45</sup> *Ballard County v. Kentucky County Debt Commission*, 162 S.W.2d 771, 773 (Ky. 1942).

<sup>46</sup> *Hurst, The Broad Form Mineral Deed as Interpreted by the Court of Appeals of Kentucky*, 29 Ky. St. Bar. J. No. 6, 39, 42 (1965).

pertaining to property law can be overturned at the whim of those who attack those precedents, the result would be such chaos as to deter investments by even the most daring and foolhardy of entrepreneurs.<sup>47</sup> The doctrine of *stare decisis* requires that there be no departure from the established rule.<sup>48</sup>

The surface owners are quick to counteract this argument by pointing out that the Court has not hesitated to overrule an earlier case where the opinion was unsound. The Court recognizes that *stare decisis* in its most rigorous form does not prevent the courts from correcting their own errors, or from establishing new rules of law when facts and circumstances of life have rendered an old rule unworkable and unjust. A recent example is *Haney v. City of Lexington*,<sup>49</sup> where the Court of Appeals receded from prior decisions which held municipal corporations immune from ordinary torts. Thus, the doctrine of *stare decisis* is a golden, not an iron, rule. It does not foreclose progress in the law by preventing a court from recognizing new interests or correcting its prior mistakes.<sup>50</sup>

In his book entitled *The Nature of the Judicial Process*, Justice Cardozo said:

But I am ready to concede that the rule of adherence to precedent, though it ought not be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.<sup>51</sup>

Also, the late Judge Jerome Frank once stated:

Judges, like doctors and others are reluctant to admit they made mistakes. Then, too, there is plain old-fashioned animal laziness. It's a nuisance to revise what you have once settled.<sup>52</sup>

When facts and circumstances of modern life have rendered an old rule unworkable and unjust, the courts should establish new rules of case law. This was recognized by Judge Hill in *Martin*:

---

<sup>47</sup> Brief for Big Sandy-Elkhorn Coal Operators Ass'n as Amicus Curiae at 12, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>48</sup> *Asher v. Bennett*, 136 S.W. 879 (Ky. 1911).

<sup>49</sup> 386 S.W.2d 738 (Ky. 1964).

<sup>50</sup> Brief for Sierra Club as Amicus Curiae at 13, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>51</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 142, 150 (1922); noted in brief for Sierra Club as Amicus Curiae at 14, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (1968).

<sup>52</sup> J. FRANK, *COURTS ON TRIAL*, 272, 273 (1950); noted in brief for Sierra Club as Amicus Curiae at 14-15, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

I freely recognize and respect the rule of *stare decisis*, and I oppose changing rules of law without compelling reasons, but it is wrong and unjust to take the position that once judicial error has gained the respectability of age it becomes somehow invulnerable to correction by the court which made it.<sup>53</sup>

#### ACTUAL PRACTICE

What has been the outcome of the Court's failure to change the result reached in *Martin*?<sup>54</sup>

The practice of severing the surface and mineral estates with the concomitant result that the surface owner has no hope or expectation of monetary gain from the successful exploitation of the mineral estate has, perhaps, more than any other factor contributed to the 'unpeaceful coexistence' between the surface owner and the mineral lessee.<sup>54</sup>

Because of the Court's adherence to its decisions in *Buchanan* and *Martin*, the owner of the mineral rights is immune from liability for damages to the surface owner for such surface rights as may be destroyed by strip mining.

It is generally recognized that land agents for the coal operators approach surface owners with the intent to secure written consent to strip mine, complete with a release from liability for any damage to the surface caused thereby. Regardless of whether payment is the traditional 25¢ or 50¢ per lineal foot of property measured along the coal seam, or Pike County's 10¢ per ton, the operators hold all the cards. If the surface owners refuse to consent to this one sided contract, the *Buchanan* decision allows the operator to strip the land anyway without even a token payment. Thus, many surface owners have little choice—they accept what is offered or nothing. Such is the daily activity in the coal areas of Eastern Kentucky, adding to the general distrust in the ability of the legal process to protect property from the ravages of strip mining. Many people of the area feel strongly that the courts and judicial system exist only to protect the rights of the wealthy mineral owners and strip mine operators.<sup>55</sup>

As Judge Hill so appropriately commented:

They [the operators] have shown in actual practice such little regard for the justice and fairness of *Buchanan* that they have not had the heart to take advantage of their legal windfall safeguarded

---

<sup>53</sup> *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 402 (Ky. 1968) (dissenting opinion).

<sup>54</sup> J. Bailey, *Disruptions to Peaceful Coexistence of Surface Owner & Mineral Lessee*, 2 NATURAL RESOURCES LAWYER 154, 155 (1969).

<sup>55</sup> *Schneider*, *supra* note 2, at 652.

and guaranteed by the rule in *Buchanan* and have in many cases been compensating the surface owner for 'oppressive' damages done the surface owner.<sup>56</sup>

Whether this attempt by the strip mine operators to purchase strip mining rights is the result of their charitable nature or whether it reflects the coal industry's belief that *Buchanan* and *Martin* are legally unsound is a debatable question.

#### CONCLUSION

There is something that violates the very character and concept of America in the fact that a company in its search for coal may enter another man's property against his wishes, destroy his land, wreck his livelihood, and endanger his home, family and personal safety. . . .

This is not right. This is not the decent or civilized way of doing things. Disregarding the waste of our natural resources and the violation of all rules of conservation and common sense, this flies in the face of the American belief in fair play, the sanctity of private ownership, and the right of every man to have, hold, develop and defend what is rightfully his. . . .<sup>57</sup>

The judicial interpretation of the broad form deed is a public question vital to the welfare of the citizens of a large area of Kentucky. At the time the broad form mineral deed was entered into by the grantors and grantees, co-existence and compatibility of the two estates was contemplated. Since that time, technological change has produced an irreconcilable conflict in this concept; justice cannot be achieved by an arbitrary preference of the mineral holder over the surface owner.

The original grantees (coal companies) prepared the broad form deeds and for a trivial sum secured their execution by people who could not even sign their names;<sup>58</sup> for example, in 1880 the total Kentucky population was 1,163,498 and of this number 29.9 per cent or 348,392 people were illiterate. By 1900 the total population in Kentucky was 1,589,685 and of this number 262,954 or 16.5 per cent of the

---

<sup>56</sup> *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 403 (Ky. 1968) (dissenting opinion).

<sup>57</sup> *Louisville Courier-Journal*, July 6, 1967, at 14, col. 17; noted in brief for the Appalachian Group to Save the Land and People at 4, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968). (The Appalachian Group to Save the Land and People is a private non-profit organization dedicated to the conservation and well-being of the citizens of Kentucky by opposing strip-mining in Eastern Kentucky).

<sup>58</sup> Brief for Kentucky Civil Liberties Union as Amicus Curiae at 19, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

residents were illiterate.<sup>59</sup> Furthermore, it is a valid assumption that the Eastern Kentucky counties—the counties where the broad form deed was introduced—would have an even higher illiteracy rate than the state as a whole.

The broad form deed as prepared by the coal operators does not deserve the broad interpretation being given it by the Court. The coal industry did not bargain for what it received and the surface owners did not sell such a license as the Court has construed for the destruction of the land they devised to the present generation. If one may be legally deprived of the use of his land without his consent and without fair compensation, disrespect for the law is bred.<sup>60</sup> *Buchanan* stated that the grantee could remove coal by strip mining processes which would result in destruction of the surface and was not liable for damages to surface owners for such destruction in the absence of arbitrary, wanton or malicious destruction. Because wantonness is a state of mind difficult of proof, total ruin of the surface estate is the end result.<sup>61</sup>

Since the grantees prepared the broad form deeds, they should be held liable for the ambiguity which resulted from the deed's failure to state explicitly what type mining was intended by the parties (*e.g.*, strip or underground). The Court should therefore declare that in the case of those mineral deeds which do not expressly describe the method of mining, the mineral owner may not employ strip mining as a method of extraction without the consent of the surface owner and, under no circumstances, without payment for the destruction of the surface rights. As expressed by Judge Hill in *Martin*:

I am shocked and appalled that the court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof.<sup>62</sup>

The Kentucky Court of Appeals should not deny the property rights of thousands of landowners in Eastern Kentucky by citing a decision which is contrary to law in other states. The Court should

---

<sup>59</sup> 2 TWELFTH CENSUS OF THE UNITED STATES, 1900, Part II, at xcii (1902). (Illiteracy is defined as all those persons over 10 years of age who have not acquired the ability to read and write in any language).

<sup>60</sup> Brief for Appellants at 21, *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968).

<sup>61</sup> *Id.* at 9.

<sup>62</sup> *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 402 (Ky. 1968) (dissenting opinion).

overrule *Buchanan* and *Martin*, and if this does not give the surface owners adequate relief, then the Legislature can further restrict the rights of the mineral owner. But in no event should the Kentucky Court view its role as passive. The Court should be responsive to the social pressures of today and adjust accordingly.

*Michael V. Withrow*